STATE OF MICHIGAN

COURT OF APPEALS

JEANNE SMITH,

Plaintiff-Appellant,

v

ASPHALT SPECIALTIES, INC., and DANIEL ISRAEL,

Defendants-Appellees.

UNPUBLISHED

No. 190555
Oakland Circuit Court
LC No. 94-474697-NO

Before: Markman, P.J., and McDonald and Fitzgerald, JJ.

FITZGERALD, J. (concurring in part and dissenting in part.)

I respectfully disagree with the majority's conclusion that the trial court properly granted summary disposition of plaintiff's sexual harassment claim on the basis that an action concerning the conduct occurring before April 1991 was barred by the statute of limitations.

Plaintiff filed the present action on April 11, 1994, alleging, inter alia, sexual harassment based on a hostile work environment. Plaintiff claimed that from 1988 through April 19, 1991, she was subjected to instances of sexual harassment by Daniel Israel. Specifically, plaintiff alleged that Israel made numerous offensive comments. For example, Israel suggested that plaintiff continued in her marriage only because her husband "[had] a big cock," asked her whether her husband "was the only man she ever f___ed," told her that "to receive a big contract, you might have to suck some cock or sleep with a client," and told her that she "had no tits, but had a nice ass." Plaintiff also alleged that, when she brought pictures of her daughter's high school prom to work, Israel grabbed the pictures from her, commented on the size of her daughter's breasts, and stated that her daughter "most likely lost her virginity that night . . . don't worry she probably did not scream a lot or make a bloody mess." Plaintiff further alleged that Israel constantly used vulgar language and "took every opportunity to demean and humiliate" her.

On December 11, 1990, plaintiff was laid off, but was called back to work on April 1, 1991. Plaintiff alleged that Israel continued to sexually harass her. Specifically, plaintiff alleged three instances of harassment. First, plaintiff alleged that when she returned to work she was not returned to her former

job responsibilities and was given only menial tasks. Second, plaintiff alleged that during her last week of work Israel told her that she "was still a bitch" and used vulgar language. Third, plaintiff alleged that on April 12, 1991, she was in the garage collating copies when Israel looked at her body and told her in a sexually suggestive manner that she was "looking real good."

I agree with the majority that two of the alleged timely incidents – giving plaintiff work beneath her abilities and the use of coarse language in addressing plaintiff – fail to meet the threshold requirement of being "subjected to communication or conduct on the basis of sex." I also agree with the majority that the incident that occurred when plaintiff was collating copies is *alone* insufficient to establish a hostile work environment. Cf. *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993) (generally, a single incident of sexual harassment will not create a hostile work environment). However, plaintiff is not relying solely on the latter incident to support her sexual harassment claim. Rather, plaintiff is relying on this incident as part of a continuing violation that would defeat the statute of limitations

The exception to the statute of limitations for "continuing violations" was recognized in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986); *Meek v Michigan Bell*, 193 Mich App 340, 342-344; 483 NW2d 407 (1992). The continuing violation theory may apply to avoid the statute of limitations when an employee challenges a series of allegedly discriminatory acts that are so related as to constitute a pattern where at least one of the acts occurred within the limitations period. *Id.* at 344. Factors to be considered in determining whether timely and untimely incidents of harassment constitute a continuing violation include whether they involve the same type of discrimination, the frequency of the incidents, and whether the incidents have the degree of permanence that should trigger an employee's awareness of and duty to assert his or her rights. *Sumner, supra* at 538-539.

Here, I would hold that Israel's prior actions constituted a continuing violation sufficient to avoid the statutory limitation period. The discriminatory events alleged by plaintiff involved overtly sexual comments that were recurring. Further, Israel's acts did not have such a degree of permanence that plaintiff should have asserted her rights earlier. Plaintiff attempted to internally remedy the situation by asking her superiors for help, and Israel at times promised to "clean up his act." It was not unreasonable for plaintiff to believe that Israel's discriminatory conduct would cease. Therefore, I would hold that plaintiff's claim alleged a continuing violation and that an action concerning the pre-April 1991 violations is not barred by the statute of limitations. Hence, I conclude that the trial court erred by granting summary disposition of plaintiff's sexual harassment claim.

I concur with the remainder of the majority opinion.

/s/ E. Thomas Fitzgerald